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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 418

IN THE MATTER OF THE ESTATE OF VAN B. HOOPER,
DECEASED,

Petitioner,

vs.

THE GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR JOHN D. MERWIN AS AMICUS CURIAE

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MOTION BY JOHN D. MERWIN FOR LEAVE TO FILE A BRIEF, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

John D. Merwin respectfully moves this Court for leave to file as amicus curiae a brief in support of the petition for certiorari filed on behalf of the Estate of Van B. Hooper in the above case. The consent of the attorney for petitioner has been obtained. The consent of attorney for respondent was requested but refused.

Movant was Governor of the Virgin Islands from September 1958 to April 19, 1961. In 1961 Movant received an audit report from the Office of the Comptroller of the Virgin Islands. This report recommended that no further subsidy payments be made to Mr. Hooper and that efforts be made to recover subsidies already paid on the ground that the grant of subsidy had been recommended and approved arbitrarily. Movant offi-

cially and unequivocably rejected the suggestion and the reasoning of the audit report and stated categorically that "no action will be taken by the executive branch of the Government" to terminate Mr. Hooper's subsidy or recover payments made thereunder.

In view of the strong position taken by Movant against any attempt to attack the validity of the contract between Mr. Hooper and the Government of the Virgin Islands the decision of the Court of Appeals for the Third Circuit holding that the grant of the subsidy and the continuing payments made under the grant were arbitrary inevitably reflects adversely on Movant's judgment and competence and on the qualifications of his Administration. The decision, if allowed to stand, will have a continuing adverse effect on Movant's reputation.

Moreover, Movant as citizen, property owner and member of the Bar of the Territory and as a former Governor of the Virgin Islands has a continuing interest in the success of the program for the development of that territory and in the preservation of the executive powers inherent in the office of the governor, both of which Movant respectfully submits are threatened by the decision of the court below.

Finally, as one who has approved a number of such subsidy grants and has himself been involved in payments under the grant here in question, Movant is concerned that this program should not become a trap by which unwary investors are lured to the Virgin Islands with the promise of a subsidy and then deprived of the benefits of the program.

For the foregoing reasons Movant respectfully requests permission to file a brief amicus curiae in the above case.

Respectfully submitted,

JOHN D. MERWIN, *Pro se.*

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BRIEF FOR JOHN D. MERWIN AS AMICUS CURIAE

INTEREST OF JOHN D. MERWIN AND STATEMENT OF FACTS

Van B. Hooper applied for subsidy to the Tax Exemption Board on March 20, 1951.[1] The Tax Exemption Board, after careful investigation, unanimously recommended, and the Governor granted, tentative approval of the grant on the condition that Mr. Hooper make the investment in the Virgin Islands required by law.[2] This conditional approval was required because Mr. Hooper was unwilling to commit the re-

[1] Pet. App. (petitioner's appendix) F at p. A-43.
[2] Pet. App. H at p. A-48.

quired investment to the Virgin Islands without substantial assurance that he would receive a subsidy.[3]

Mr. Hooper then made the required investment and was formally granted a subsidy on March 10, 1952.[4] This grant was made under Municipal Council Bill No. 39 which was a somewhat expanded version of Municipal Council Bill No. 35 under which Hooper's application had been made. Governor de Castro, who approved Hooper's grant, was acting governor when Bill No. 35 was enacted [5] and governor when Bill No. 39 was enacted.[6]

The grant to Mr. Hooper was in no sense concealed from the public. On the contrary, as the first subsidy issued under Bill No. 39 (and no subsidies had been issued under Bill No. 35) a considerable ceremony was made of the grant.[7]

Both Bills No. 35 and 39 contained in section 6, a provision permitting any interested party to object to the grant. Despite this provision and the publicity there is no indication of any opposition to the issuance of the grant.

In mid-1959 the comptroller of the Virgin Islands filed an audit report charging various, relatively minor, discrepancies in Mr. Hooper's return. This report was the subject of extensive intra-governmental correspondence over the next one and one-half years.[8] Amicus was then governor and at no time

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[3] *Ibid.*, p. A-49.
[4] Pet. App. I at p. A-50.
[5] Pet. App. C at p. A-30.
[6] Pet. App. D at p. A-39.
[7] Memorandum from Evan Francois to Cyril E. King. Appendix for appellee-respondent filed in the Court of Appeals, at p. 27a.
[8] *Id.*

during this period was there any question as to the propriety of the basic grant to Mr. Hooper. It was not until February 20, 1961, after one and one-half years of discussion and correspondence on the details of the amount of the subsidy payable and less than a month before the subsidy period was to expire by its own terms on March 4, 1961, that the comptroller raised the issue of the legality of the grant.[9]

The comptroller's special re-audit report of February 20, 1961, attacked the grant largely on a number of technical procedural points but also on the ground that since Mr. Hooper was not engaged in creating a product, his business was not within the act. The comptroller recommended that no further subsidies should be paid and that efforts should be made to recover subsidies already paid.[10]

Amicus categorically rejected this recommendation on the ground that it would be an abdication of the powers of the executive and legislative branches of government and an impairment of a valid contract and announced that no action would be taken to implement the comptroller's recommendations.[11]

Shortly after the retirement of Amicus as Governor of the Virgin Islands, and during the administration of Governor Paiewonsky, a full investigation of the grant was undertaken by the Tax Exemption Board and by the Attorney General of

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[9] *Ibid.*, p. 31a.

[10] Memorandum of December 29, 1961, from Francisco Corneiro, Attorney General, to Executive Secrteary. Appendix of appellee-respondent filed in the Court of Appeals, p. 19a.

[11] Letter of March 17, 1961, from John D. Merwin to Peter Bove. Appendix of appellee-respondent filed in the Court of Appeals, at p. 24a.

the Virgin Islands. Both the Tax Exemption Board [12] and the Attorney General [13] fully supported the position that the grant to Hooper was within the power of the Board and was a contract binding on the Government of the Virgin Islands.

The Hooper grant was again attacked, after the death of Mr. Hooper, by the creditor's claim filed by the Government of the Virgin Islands which claim was rejected by the executor and the United States District Court for the Virgin Islands. The United States Court of Appeals for the Third Circuit reversed.

ARGUMENT

The Court of Appeals for the Third Circuit has basically misconstrued the nature of the function of the Tax Exemption Board and the Governor under the Virgin Islands investment incentive program as set out in Bill No. 35 and Bill No. 39. The Court has treated the Tax Exemption Board as a mere contract officer or procurement agent and applied to it the principle that the decision of such an agent may be overturned at any time in the future that a court may determine that his decision was incorrect as a matter of law. In fact, the Tax Exemption Board, acting in conjunction with and under the supervision of the Governor, is an administrative agency with rule making and adjudicative or quasi-judicial as

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[12] Memorandum from Evan Francois to Cyril E. King. Appendix for appellee-respondent filed in the Court of Appeals, at p. 27a.

[13] Letter of March 17, 1961, from John D. Merwin to Peter Bove. Appendix of appellee-respondent filed in the Court of Appeals, at p. 24a.

well as investigative functions. As an administrative agency, its decisions are binding even if erroneous. Errors may, of course, be corrected by appeal but a decision, even if erroneous as a matter of law, is binding and may not be collaterally attacked if the matter is within the jurisdiction of the agency, that is, if the issue is of the general type the agency is empowered to decide, *National Labor Relations Board* vs. *Pappas & Co.*, 203 F.2d 569, 571 (9th Cir. 1953), *Callahan Road Improvement Co.* vs. *United States*, 345 U.S. 507 (1953).

This rule may not be avoided by the simple expedient, employed by the Court below, of holding that the Board's and the Governor's power is limited to recommending and granting subsidies authorized by law and that, therefore, the Board lacked jurisdiction to recommend a grant which the Court subsequently decided was not within the terms of the Bill. This would make the Board's jurisdiction completely dependent on the correctness of its ultimate decision on the merits and would deprive its decision of any finality.

It can hardly be denied that the Board had jurisdiction to determine whether Mr. Hooper was entitled to a subsidy. Thus, Bill No. 35 provides in section 5(a) that the

> "Board shall exercise the following powers and authority subject to the approval of the Governor:
>
> "1. Investigate all applications for tax or fee exemptions and for the grant of subsidies hereunder and recommend to the Governor that such applications be approved or disapproved in accordance with the provisions of this ordinance; . . ."

And 5(a) of Bill No. 39 contains a similar provision. Since the Board had jurisdiction to decide on Hooper's application for a subsidy, that decision, even if erroneous, could not prop-

erly be challenged in a collateral proceeding such as the one before the Court.

The doctrine that an erroneous decision on the law by the Board deprives it of jurisdiction poses a threat not only to the security of all grants made under the Virgin Islands subsidy program, a security essential to the success of such a program, but a threat to the finality of decisions of administrative agencies of all types and urgently requires correction by this court.

Moreover, it is respectfully submitted that the grant of the Hooper subsidy should have been sustained on the merits. Bill No. 39 under which the grant was made expressly stated in section 2 that a person was eligible for a subsidy if

> "duly qualified to do any business in the municipality of St. Croix involving the manufacture, processing, creation or production of any articles or commodities *or carrying on any business* which were not being manufactured, processed, created, produced *or carried on* within the said municipality within the year 1947. . . ." (emphasis added)

The Court below chose to construe "any business" as not including personal service businesses on the ground that such businesses would not be beneficial to the economy of the Virgin Islands. This holding is inconsistent with the language of Bill No. 39 and is made without any supporting legislative history. Furthermore, this holding overrules the approval of the grant by Governor de Castro who, as acting governor when Bill No. 35 was enacted and as governor when Bill No. 39 was enacted, was in a far better position than the Court of Appeals to know the intention of the Municipal Council in enacting these Bills.

In addition to the necessity of protecting the finality of the decisions of administrative agencies, the decision of the Court

of Appeals should be reviewed and reversed by this Court to correct a manifest injustice to Mr. Hooper and to discourage unconscionable governmental behavior of the type represented by the attack on this grant.

Mr. Hooper invested money in the Virgin Islands and maintained his investment in reliance on the promise of the Government of the Virgin Islands, which promise the Municipal Council has endeavored to make a binding contract by every means available to it. Now, over 14 years after issuing the grant, the Government of the Virgin Islands, dissatisfied with the over one quarter of a million dollars which it has received from Mr. Hooper and which it would not have received but for the grant of the subsidy, seeks to obtain an additional windfall of over a million dollars. Such conduct, shocking under any circumstances, is particularly unfair in the context of this case.

Thus, the Court of Appeals placed great emphasis on the alleged fact that Mr. Hooper intended to do in the Virgin Islands only the same things which he had previously done as editor of *Ideals*.[14] In fact, there is no evidence in the record that Mr. Hooper intended, when making his application, to limit himself to acting as an editor for *Ideals*. The application itself shows that he proposed to engage in "creative editorial, advertising, tourist promotion and merchandising counsel," without any indication that *Ideals* would be his only client or customer.[15] The implied finding that this application was untruthful in this regard and the attack on the grant on that basis is particularly unfair since Mr. Hooper is now deceased and unable to testify as to his intentions and conduct.

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[14] Pet. App. B at pp. A-16-A-17.

[15] Pet. App. F at p. A 43.

The cavalier disregard of its commitments which the Government of the Virgin Islands has shown by the institution of this suit turns the investment subsidy program into a trap for unwary investors and should not be rewarded by the windfall which would result from requiring a return of the subsidies paid.

CONCLUSION

For the foregoing reasons the petition for the Writ of Certiorari filed by the Estate of Van P. Hooper should be granted.

Respectfully submitted,

JOHN D. MERWIN, *Pro se*

August 26, 1966

CERTIFICATION

I, John D. Merwin, Amicus Curiae, hereby certify that a copy of the foregoing Motion for Leave to File Brief Amicus Curiae, and Brief of Amicus Curiae, was served on the following counsel by depositing the same in the United States Mail with postage prepaid on September 6, 1966:

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A member of the Bar of this Court.